

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF PUERTO RICO  
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LYSSETTE MILAGROS SANTIAGO-  
ORTIZ,

Plaintiff,

v.

PUBLIC BROADCASTING SERVICE,  
et. al.,

Defendants.

Civil No. 12-1964 (JAF)

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7 **OPINION AND ORDER**

8 We must decide whether to dismiss an employee's Title VII, Sections 1981 and 1983,  
9 and related Commonwealth law claims against her former employer.

10 **I.**  
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12 **Background**  
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14 Lissette Milagros Santiago-Ortiz sued several defendants connected to her former  
15 employer because she says they discriminated against her on the basis of her age, seniority  
16 status, gender, and medical condition in violation of Title VII, 42 U.S.C. §§ 1981 and 1983  
17 and Commonwealth law statutes. She claims the discrimination resulted in her illegal firing.  
18 The Public Broadcasting Corporation of Puerto Rico ("PBS") moves to dismiss the  
19 complaint. (Docket Nos. 55, 56.)

1 II.

2 Legal Standard

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5 A. Fed.R.Civ.P. 12(b)(1)

6 A defendant may move to dismiss an action against her under Federal Rule of Civil  
7 Procedure 12(b)(1) for lack of federal subject matter jurisdiction. See Fed.R.Civ.P. 12(b)(1).  
8 “When a defendant moves to dismiss for lack of federal subject matter jurisdiction, ‘the party  
9 invoking the jurisdiction of a federal court carries the burden of proving its existence.’”  
10 Johansen v. United States, 506 F.3d 65, 68 (1st Cir. 2007) (citation omitted). Under Rule  
11 12(b)(1), there are two types of attacks on jurisdiction: Facial and factual. See Torres-  
12 Negron v. J & N Records, LLC, 504 F.3d 151, 162 (1st Cir. 2007). A facial attack alleges  
13 that a complaint insufficiently pleads subject-matter jurisdiction. Id. When reviewing a  
14 facial attack, a court takes allegations in the complaint as true, just as in a 12(b)(6) motion to  
15 dismiss. Id. A factual attack, by contrast, disputes facts alleged in a complaint that support  
16 subject-matter jurisdiction. Id. In that instance, there is no presumptive truthfulness. Id.

17 B. Fed.R.Civ.P. 12(b)(6)

18 A plaintiff’s complaint will survive a motion to dismiss if it alleges sufficient facts to  
19 establish a plausible claim for relief. See Fed.R.Civ.P. 12(b)(6); Ashcroft v. Iqbal, 556 U.S.  
20 662, 678 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). In assessing  
21 a claim’s plausibility, the court must construe the complaint in the plaintiff’s favor, accept all  
22 non-conclusory allegations as true, and draw any reasonable inferences in favor of plaintiff.  
23 San Geronimo Caribe Project, Inc. v. Acevedo-Vila, 687 F.3d 465, 471 (1st Cir. 2012)  
24 (citation omitted).

### III.

42 U.S.C. § 1983 creates a cause of action against those who, acting under color of state law, violate a plaintiff's Constitutional or federal rights. See 42 U.S.C. § 1983; Maine v. Thiboutot, 448 U.S. 1, 4 (1980).

1 and ten months after her dismissal. Therefore, the Santiago-Ortiz Section 1983 claims are  
2 time-barred.

3 Santiago-Ortiz advances a claim of retaliation based on sex or gender discrimination  
4 under 42 U.S.C. § 1981. Section 1981, however, does not encompass sex discrimination  
5 claims. See Butler v. Crittenden County, Ark., 708 F.3d 1044, 1051 (8th Cir. 2013); see  
6 also, e.g., Sagana v. Tenorio, 384 F.3d 731, 738 (9th Cir. 2004) (Section 1981’s guarantee  
7 that “all persons” may enjoy the same rights that “white citizens” enjoy does not protect  
8 against discrimination on the basis of gender, religion, or political affiliation); Denny v.  
9 Elizabeth Arden Salons, Inc., 456 F.3d 427 (4th Cir. 2006). As such, Santiago-Ortiz failed to  
10 state a claim under Section 1981.

11 Under Title VII, a person seeking remedy from employment discrimination is  
12 required to file a charge with the EEOC within 180 or 300 days after the “alleged unlawful  
13 employment practice occurred.” Johnson v. University of Puerto Rico, 714 F.3d 48, 53 (1st  
14 Cir. 2013) (citation omitted). Puerto Rico is a “deferral” jurisdiction; therefore, the  
15 administrative charge must be filed within 300 days of the alleged unlawful conduct. Id.

16 Contrary to PBS’ assertion, Santiago-Ortiz filed charges with the EEOC within the  
17 prescribed 300-day period. (Docket Nos. 73, 74.) Santiago-Ortiz was terminated from her  
18 position on February 1, 2011. She filed a claim with the EEOC on November 17, 2011—or  
19 289 days later. As such, Santiago-Ortiz’s Title VII claims are not time-barred.

20 In the alternative, PBS argues that it is “an arm of the Commonwealth” and entitled to  
21 Eleventh Amendment immunity. (Docket No. 30 at 17–18.) We disagree.

22 The Eleventh Amendment of the United States Constitution bars suits in federal  
23 courts by private parties seeking damages that would be paid from the state treasury. Quern  
24 v. Jordan, 440 U.S. 332, 337 (1979). Unless the state consents to be sued, the Eleventh  
25 Amendment proscribes suits against a state or one of its departments. Pennhurst State

1 School & Hospital v. Halderman, 465 U.S. 89, 100 (1984). Immunity extends to state  
2 agencies and their officials when the agency or institution is characterized as an arm or alter  
3 ego of the state or when it should be treated instead as a political subdivision of the state.  
4 Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977); see also  
5 Frensenius Medical Care Cardiovascular Resources, Inc. v. Puerto Rico and Caribbean  
6 Cardiovascular Center Corp., 322 F.3d 56, 63 (1st Cir. 2003) (twin goals of the Eleventh  
7 Amendment—protection of the state's treasury and of its dignitary interests—explicitly  
8 govern the arm-of-the-state analysis.). Furthermore, the Supreme Court has decided that  
9 neither a state nor its agencies are “persons” susceptible to being sued under Section 1983.  
10 Will v. Michigan Department of State Police, 491 U.S. 58, 71 (1989); Quern, 440 U.S. at  
11 339–42. The Commonwealth of Puerto Rico enjoys the protection of the Eleventh  
12 Amendment. See Maysonet–Robles v. Cabrero, 323 F.3d 43, 53 (1st Cir. 2003).

13 In a prior case, we denied immunity to WIPR, the television-media division of the  
14 Puerto Rico Corporation for Public Broadcasting. Pastrana-Torres v. Zabala Carrion, 376  
15 F.Supp.2d 209 (D.P.R. 2005). There, we found that, despite significant financial support  
16 from the Commonwealth of Puerto Rico and a board appointed by the Governor of Puerto  
17 Rico and confirmed by the Commonwealth Senate, the fact that WIPR could “sue and be  
18 sued” and that it had “been separately incorporated” meant that Eleventh Amendment  
19 immunity did not protect it from suit. Our decision was affirmed by the First Circuit.  
20 Pastrana-Torres v. Corporación de Puerto Rico para la Difusión Pública, 460 F.3d 124  
21 (2006). The distinctions, if any, that exist between WIPR and PBS are without essential  
22 difference: Both are governed by 27 L.P.R.A. § 501 (2002); both are empowered to sue and  
23 be sued, enter into contracts, and receive, administer, and comply with the legal conditions  
24 attached to gifts, grants, and donations. Therefore, PBS’ assertion of the sovereign immunity  
25 protection of the Eleventh Amendment fails.

1 **IV.**

2 **Conclusion**

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5 For the foregoing reasons, PBS' motion to dismiss, (Docket Nos. 55, 56), is  
6 **GRANTED IN PART** and **DENIED IN PART**. Their motion to dismiss Santiago-Ortiz's  
7 Sections 1981 and 1983 claims is **GRANTED**. Their motion to dismiss Santiago-Ortiz's  
8 Title VII claims is **DENIED**. Because we retain jurisdiction over Santiago-Ortiz's Title VII  
9 claims, jurisdiction over her supplemental Puerto Rico law claims remains proper under 28  
10 U.S.C. § 1367.

11 **IT IS SO ORDERED.**

12 San Juan, Puerto Rico, this 4th day of December, 2013.

13 S/José Antonio Fusté  
14 JOSE ANTONIO FUSTE  
15 U. S. DISTRICT JUDGE